BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAYMOND KUBICKI	)	
Claimant	)	
	)	
VS.	)	
	)	
JRH BIOSCIENCES	)	
Respondent	)	Docket No. 1,028,432
	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the October 3, 2006, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) found this claim to be compensable and ordered respondent to provide medical treatment for claimant's injury to his left knee, stating:

> The September 28, 2004 injury was the one that made a bad knee irreparable, except by arthroplasty. Reasonable and necessary medical treatment to cure and relieve the effects of the September 28, 2004 injury shall include the left knee arthroplasty recommended by Dr. Randall.[1]

However, the ALJ denied claimant's request for a change of physician to Dr. Jon Browne. This finding was not appealed.

[1] ALJ Order (Oct. 3, 2006) at 2.

Respondent argues that claimant's need for a total knee replacement arose as early as 2002 and is recommended based on claimant's age, not as a result of a work-related accident. Respondent claims the medical treatment ordered is not due to an injury that arose out of and in the course of claimant's employment and requests the Board reverse the ALJ's Order.

Claimant asserts that the Board does not have jurisdiction to hear this matter pursuant to K.S.A. 44-534a, stating that the issue of whether the need for treatment predated the injury is a separate and distinct issue from whether the injury arose out of and in the course of employment. Claimant argues that claimant is entitled to medical treatment for the injury he suffered to his knee that arose out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was injured on September 28, 2004, while working for respondent when he climbed a platform ladder to take a water sample. While taking the sample, the ladder tipped and wobbled, causing his left knee to buckle. Claimant fell off the ladder, landing on his butt. He felt immediate pain in his left knee, which he claims was injured when it buckled.

Claimant has a long history of injuries and aggravations to his left knee, starting in the 1980's. He has had at least three previous on-the-job injuries and six surgeries on his left knee. He has been told by three doctors that he needs a total left knee replacement, at least one of those before the date of the accident here. Claimant's most significant injury appears to have occurred in 1992 when he tore his anterior cruciate ligament (ACL) in a work-related injury. Surgery to repair this ACL was performed by Dr. Jon Browne in 1993. Claimant filed a workers compensation claim for his 1992 injury, *Kubicki v. Johnson Controls*, Docket No. 173,439, which was settled on March 28, 1994. All issues, including future medical, were left open per agreement of the parties.

After claimant's injury in September 2004, he was seen by Dr. Jeffrey Randall. Claimant had been seeing Dr. Randall for problems with his left knee since May 2002. On October 15, 2004, Dr. Randall diagnosed claimant with possible medial collateral ligament sprain with possible re-injury to his ACL. In January 2005, Dr. Randall opined that claimant's pain and instability was not coming from his ACL but was caused from degenerative joint disease. Dr. Randall noted that claimant "is really looking at a total knee

replacement in the coming years."[2] By December 9, 2005, Dr. Randall's medical records note:

> . . . [Claimant] has a long history of injuries to his left knee. He was noted during his ACL reconstruction in 1993 to have moderate degenerative joint disease at that time and even had some degenerative changes in his patellofemoral joint back in the 1980s. These injuries have resulted in what is now end stage degenerative joint disease that has been unresponsive to conservative care. We have discussed total knee arthroplasty and the plan is to proceed with a total knee arthroplasty . . . .[3]

Claimant was seen by Dr. Browne on January 9, 2006. Dr. Browne diagnosed claimant with end stage degenerative joint disease of the left knee and also opined that claimant was in need of a joint arthroplasty for his left knee. In attempting to determine the etiology of claimant's left joint disease, Dr. Browne stated:

> [T]he most significant injury was that to his anterior cruciate ligament, which over a period of time has become more lax, and the lateral compartment, which was essentially normal at the time of surgery in 1993, has now deteriorated.
>
> Whether or not all of his present degenerative joint change findings would have occurred had it not been for the injury of 1992, which precipitated the surgery in 1993, it is difficult to know.[4]

Claimant was also evaluated by Dr. Roger Hood. In his report of March 1, 2006, Dr. Hood agreed that claimant was a candidate for total knee arthroplasty on the left. He further stated: "I would feel that the intervening twelve years [after the 1993 repair of claimant's ACL] of heavy manual labor and a couple [of] specific compensable injuries to his left knee have slightly accelerated his need for total knee arthroplasty."[5]

Claimant filed an Application for Post Award Medical in Docket No. 173,439, requesting treatment for his left knee, including a total knee arthroplasty on the left. In the Post-Award Medical Award, the ALJ concluded:

> The preponderance of the evidence failed to prove that left knee arthroplasty is medical treatment to cure and relieve the effects of the 1992 ACL tear. Too many

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[2] P.H. Trans. (Oct. 2, 2006), Cl. Ex. 2 at 4.

[3] *Id.*, Cl. Ex. 2 at 1.

[4] *Id.*, Cl. Ex. 3 at 2.

[5] *Id.*, Resp. Ex. B at 70.

> years and other injuries have intervened, and contributed to the need for arthroplasty. The claimant's request for post-award medical benefits is denied.[6]

Claimant appealed the denial of post-award medical to the Board, which affirmed the ALJ, stating:

> The Board has considered the parties' evidence and arguments as well as the ALJ's reasoning and concludes the ALJ's findings should be affirmed. While there is medical testimony that the 1992 ACL tear was the most significant event, the difficulty is that the very same medical testimony establishes that the subsequent events in 1998, 2002 and 2004 contributed to and made his condition worse. No physician testified that irrespective of those subsequent events, claimant would have, as a natural and probable result, required a knee replacement as a result of the 1992 injury. Moreover, claimant went a significant period of time, from 1993 to 1998, where he required no medical treatment for his knee complaints and continued to work without incident. Based upon this record, the Board finds claimant failed to establish that claimant's present need for a knee replacement is the direct, natural and probable consequence of his 1992 injury.[7]

Claimant filed an Application for Preliminary Hearing in this case on September 8, 2006, requesting treatment for his left knee. The ALJ ordered respondent to provide claimant with medical treatment to cure and relieve the effects of the September 28, 2004, injury, including left knee arthroplasty. Respondent appeals this decision to the Board. Claimant asserts the Board has no jurisdiction over this issue.

The first issue that must be addressed is whether the Board has jurisdiction to review the ALJ's order for medical treatment. Generally, issues concerning medical treatment, including whether claimant is in need of additional treatment and, if so, whether the treatment ordered by the ALJ is appropriate, are questions within the ALJ's jurisdiction to decide and are not reviewable by the Board on appeal from a preliminary hearing order. However, whether claimant's current complaints and need for surgery are directly attributable to the September 28, 2004, accident is an issue the Board may review on an appeal from a preliminary hearing order because it gives rise to the jurisdictional issue of whether his injury and need for treatment arose out of and in the course of his employment with respondent.[8]

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[6] *Id.*, Cl. Ex. 1 at 4.

[7] *Kubicki v. Johnson Controls*, No. 173,439, 2006 WL 3298916 (Kan. WCAB Oct. 19, 2006). One Board Member dissented, stating that he would grant claimant's request for the knee replacement surgery as a natural consequence of the 1992 injury.

[8] See K.S.A. 44-534a(a)(2) and K.S.A. 2005 Supp. 44-551(b)(2)(A).

Turning now to the merits of this appeal, Kansas has long recognized the natural and probable consequence rule. The Supreme Court in *Nance*[9] stated:

> When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

However, where the injury is aggravated by an independent cause, such as a new industrial accident, the condition is no longer a direct and natural result of the prior accident. The Supreme Court in *Nance* also said:

> In *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 262, 505 P.2d 697 (1973), we noted that while the natural and probable consequences rule would not apply to a situation where the increased disability results from a new and separate accidental injury, "[t]he rule in *Jackson*[10] would apply to situation where a claimant's disability gradually increased from a primary accidental injury."[11]

Based upon the record compiled to date, claimant has proven that his September 28, 2004, accident aggravated his preexisting knee condition and accelerated his need for the arthroplasty.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 3, 2006, is affirmed.

IT IS SO ORDERED.

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[9] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 4, 952 P.2d 411 (1997).

[10] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[11] *Nance*, 263 Kan. at 549.

[12] K.S.A. 44-534a.

[13] K.S.A. 44-555c(k).

Dated this _____ day of December, 2006.

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BOARD MEMBER

c: Stephanie J. Haggard, Attorney for Claimant
Shelly E. Naughtin, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge